



Comptroller General
of the United States

1207277

Washington, D.C. 20548

Decision

Matter of: Victoria Inn Ltd.; Beige Plane, Ltd.

File: B-256724; B-256724.2

Date: July 21, 1994

Herbert C. Ross, Specialized Contract Services, Inc., for Victoria Inn, Ltd.; and Robert M. Cambridge, Esq., for Beige Plane, Ltd., the protesters.

Eugenio F. Pittelli, for Econo Lodge Hotel, an interested party.

Elizabeth DiVecchio Berrigan, Esq., Department of the Army, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bid delivered by the U.S. Postal Service to the government installation approximately 3 weeks prior to the scheduled bid opening, as established by agency time/date stamp, properly was considered for award where the record establishes that government mishandling after receipt of the bid package was the sole reason why the bid was not opened at bid opening.
2. Fact that a certificate of procurement integrity included in a bid did not include the typed name of the certifying official who executed the certificate does not render the bid nonresponsive where the certificate is otherwise properly completed and executed.
3. Agency properly did not apply the 10-percent preference for small disadvantaged businesses on an invitation for bids (IFB) set aside for small business, notwithstanding that the IFB erroneously included the preference clause; the protester was on notice that under applicable regulations the preference was not applicable to small business set-asides.
4. Third-low bidder is not an interested party to protest award since even if its protest were sustained, the second-low bidder, not the protester would be in line for award.

DECISION

Victoria Inn Ltd. d/b/a Howard Johnson Albany Airport Central and Beige Plane, Ltd. d/b/a Thruway Inn protest the award of a contract to Econo Lodge Hotel under invitation for bids (IFB) No. DAKF36-94-B-0003, issued by the Department of the Army.

We dismiss and deny the protests.

The IFB was issued on December 2, 1993, as a total small business set-aside, and required the successful contractor to provide meals, lodging, transportation, and test room facilities for the Military Entrance Processing Station (MEPS) in Albany, New York. The IFB contemplated the award of a fixed-price contract for a base year with two 1-year options.

At the January 5, 1994, bid opening, four bids were opened; no bidders' representatives were present. Beige Plane was the apparent low bidder with a total bid of \$380,424 for the base and option years and Victoria Inn was the apparent second-low bidder at \$408,406.60. On January 6, Victoria Inn filed a challenge to Beige Plane's status as a small business with the contracting officer which was referred to the Small Business Administration (SBA). On February 23, the SBA found that Beige Plane qualified as a small business for purposes of this procurement.

On February 7, while the size protest was pending before the SBA, Econo Lodge contacted the Army to find out about the bid results. At that time, the agency learned that Econo Lodge had submitted a bid in response to the solicitation. Upon investigation, the contracting officer discovered that a bid package had, in fact, been received from Econo Lodge. The unopened package was postmarked December 9, 1993, and was time/date stamped as received in the agency's contracting office at 2:29 p.m. on December 13, some 3 weeks before the January 5 bid opening. The agency explains that the package was found unopened in the bid file cabinet in the solicitation file for IFB No. DAFK36-94-B-0002 (another solicitation for which bid opening had been suspended indefinitely). The contracting officer reviewed the circumstances surrounding the receipt of Econo Lodge's bid package and concluded that but for the agency's mishandling after receipt at the agency installation, Econo Lodge's bid package would have been opened and considered for award. The contracting officer therefore decided to consider the bid from Econo Lodge as timely received. Econo Lodge thus became the apparent low bidder with a total bid of \$361,560.

On March 3, the Army made award to Econo Lodge as the low responsive, responsible bidder. By letter of the same day, the agency informed the unsuccessful bidders of the award to Econo Lodge; that letter was received by both Victoria Inn and Beige Plane on March 9. On March 15 and March 17, Victoria Inn and Beige Plane filed their respective protests.

BEIGE PLANE PROTEST

Beige Plane protests that Econo Lodge's bid was late because that firm was substantially responsible for the mishandling of its bid package, inasmuch as the sealed bid mailing label was not marked to indicate the date and time of bid opening, as required by the IFB.

It is the responsibility of the bidder to deliver its bid to the proper place at the proper time, and late delivery generally requires that a bid be rejected. See Bracco Constr. Co., B-222132, May 5, 1986, 86-1 CPD ¶ 433. In determining relative responsibility for the delivery of a late bid to the bid opening official, we consider all the circumstances surrounding its delivery and compare the actions of the government and the bidder to determine whether the bidder acted unreasonably. See John J. Kirlin, Inc., B-250244, Dec. 15, 1992, 92-2 CPD ¶ 419.

We believe the evidence in this case was sufficient to permit acceptance of Econo Lodge's bid. The bid package was clearly marked as containing a sealed bid as evidenced by the sealed bid label affixed to the bid envelope. (The awardee had entered the solicitation number on the sealed bid label). The bid package was mailed on December 9, 1993, as evidenced by the postmark of that date, and was received in the agency's contracting office on December 13, as evidenced by the agency's time/date stamp, some 3 weeks prior to the scheduled bid opening. The bid package was simply misfiled in the bid cabinet, even though the correct solicitation number was on the envelope. Thus, we agree with the contracting officer that mishandling on the part of agency personnel was the paramount/sole reason why Econo Lodge's bid was not opened at bid opening. See M.J.S., Inc., B-244410, Oct. 17, 1991, 91-2 CPD ¶ 344.

Moreover, contrary to Beige Plane's suggestion, it is clear that the integrity of the competitive bid system will not be compromised by acceptance of Econo Lodge's bid. Econo Lodge's bid was exclusively within the agency's control approximately 3 weeks before bid opening; thus, there is no reasonable possibility that the bid was altered after bid opening. See Excel Servs., Inc., B-217184; B-218039, May 8, 1985, 85-1 CPD ¶ 514.

Beige Plane also maintains that Econo Lodge's bid was nonresponsive because its certificate of procurement integrity was not properly executed. The protester bases this argument on the fact that the certificate did not include the typed name of the certifying official who signed the certificate. This argument is without merit. It is not reasonable to conclude that the awardee's failure to type the name of the certifying official directly below his signature renders the bid nonresponsive where the certificate was otherwise properly executed. See Firebird Constr. Corp., 71 Comp. Gen. 268 (1992), 92-1 CPD ¶ 211. Omission of the typed name of the certifier was properly waivable as a minor informality since there was no question that the certifier, by his signature, bound himself and the bidder to comply with the terms and obligations imposed by the certificate. Id.

Beige Plane's protest is denied.¹

VICTORIA INN PROTEST

Victoria Inn contends that Econo Lodge was not eligible to receive the MEPS contract since at the time of award, Econo Lodge's facility was not equipped with an automatic sprinkler system as required by the Hotel and Motel Fire Safety Act of 1990, Pub. L. No. 101-391, 104 Stat. 747 (1990). However, Victoria Inn, the third-low bidder, is not an interested party to raise this issue as it is not next in line for award if Econo Lodge were not eligible for award. Victoria Inn nevertheless argues that in evaluating bids, the Army failed to apply the small disadvantaged business (SDB) evaluation preference, and that if the preference were applied, its bid would be second low, which would confer it with the requisite interested party status to protest the Econo Lodge award.

Under the SDB preference clause, Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7006(b), which was incorporated by reference in the solicitation, a factor of 10 percent is supposed to be added to all bid prices except, as is relevant here, those of SDB concerns. However, where, as here, the procurement is conducted as a total small business set-aside, the DFARS precludes the use of the SDB preference. DFARS § 219.7001(b)(3). We think the protester had sufficient notice, from the solicitation which was

¹ Beige Plane also argues that it was prejudiced by the Army's failure to provide the pre-award notice required by Federal Acquisition Regulation (FAR) § 15.1001(b)(2). As the agency correctly points out, the pre-award notice requirement does not apply to procurements using sealed bid procedures.

clearly identified as a 100-percent small business set-aside and from the published regulations, of the inapplicability of the SDB evaluation preference to this acquisition. See Perdomo & Sons, Inc., B-240436, Nov. 19, 1990, 90-2 CPD ¶ 404. Thus, as required by the DFARS, the contracting officer properly did not apply the SDB evaluation preference to the bids received under this procurement, notwithstanding the apparent inadvertent incorporation by reference of the SDB evaluation preference clause into the solicitation. Id. Accordingly, Victoria Inn's bid was properly ranked third in line for award.

Thus, even if we sustained Victoria Inn's protest that Econo Lodge was ineligible for award for failing to offer a facility in compliance with the Hotel and Motel Fire Safety Act, the second-low bidder, Beige Plane, not Victoria Inn, would be in line for award. Victoria Inn therefore lacks the direct economic interest necessary to maintain its protest against the awardee. 4 C.F.R. § 21.0(a) (1994); Delta Chemical Corp., B-255543, Mar. 4, 1994, 94-1 CPD ¶ 175.

Victoria Inn's protest is dismissed; Beige Plane's protest is denied.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel

² Since DFARS § 219.7001(b)(3) was published in both the Federal Register and Code of Federal Regulations, potential bidders were therefore on constructive notice of the DFARS' contents.

³ In any event, the solicitation requires the successful contractor to comply with all federal, state, and local codes and regulations applicable to its facility. Whether Econo Lodge had the ability to comply, or will ultimately comply, with the automatic sprinkler system requirements of the Hotel and Motel Fire Safety Act as it is applicable, are matters of that firm's affirmative responsibility and contract administration, respectively, neither of which matters our Office will review except in circumstances not present here. 4 C.F.R. § 21.3(m)(1), (5); Coastal Elecs., Inc., B-250718, Feb. 16, 1993, 93-1 CPD ¶ 144; Louisville Cooler Mfg. Co., B-243546, June 13, 1991, 91-1 CPD ¶ 568.